

MSVR EQUIPMENT RENTALS LTD.

IBLA 2001-283

Decided October 3, 2003

Appeal from a decision of the Las Vegas, Nevada, Field Office, Bureau of Land Management, implementing a suspension of further sales of mineral materials from the Pahrump Community Pit. N-74204.

Affirmed.

1. Materials Act--Trespass: Generally

Where BLM holds a purchaser of materials under a materials sale contract in trespass for removing materials in excess of his authorization and failing to pay for them, the purchaser does not sufficiently rebut the trespass by refusing to provide its sale and haul records demanded by BLM or by demanding that BLM investigate other material sales contracts. Where a purchaser refuses to rebut evidence that it removed materials in excess of its authorization to do so and refuses to pay or settle payment demands for the excess material served on it by certified mail, BLM may properly suspend further sales and require the purchaser to remove its equipment from the site.

APPEARANCES: D.R. Schmidt, Pahrump, Nevada, for MSVR Equipment Rentals Ltd., Mark Chatterton, Las Vegas, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

MSVR Equipment Rentals LTD appeals from a May 2, 2001, decision of the Assistant Field Manager, Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), implementing a suspension of further sales to MSVR of mineral materials from the Pahrump Community Pit in sec. 29, T. 20 S., R. 54 E., Mount Diablo Meridian. The decision was premised on MSVR's failure to respond to a

Notice of Trespass which found that MSVR had removed sand and gravel from the pit in excess of the contract amount. The decision required MSVR to remove its equipment from the community pit site.

In its notice of appeal, MSVR also requested a stay of the decision pending appeal. 43 CFR 4.21. The Board denied that request by order dated June 28, 2001.

The record indicates the MSVR entered into a series of contracts, each for the purchase of between 200 cubic yards and 1,000 cubic yards of sand and gravel from the Pahrump Community Pit from 1998 through 2000. The contract terms, and also special stipulations attached to the contracts, permitted BLM to suspend operations after notice to MSVR of a contract violation, and to recover damages if the violation was not remedied within 30 days. See Contract 202, Sept. 1, 2000, Section 11; Contract Exhibit B, Special Stipulation 7 for Community Pit Sand and Gravel Operations.^{1/}

In total, MSVR contracted to purchase and pay for, and BLM sold, 8,300 cubic yards of material during this period. While it paid for 8,300 cubic yards by prepaying the contracts, MSVR reported a cumulative production total of 7,399 cubic yards. See Monthly Reports of Material Removed Under Contract.

On November 17, 2000, BLM conducted a compliance inspection and verification survey for MSVR's operation. "The survey was conducted to calculate the volume of material removed from the site." (Jan. 18, 2001, Nevada 3600 Compliance Inspection Report.) BLM surveyors concluded that 21,447 cubic yards of material had been removed from the site. In addition, BLM hired Triangle Surveying Inc. to conduct on November 26, 2000, a Global Positioning System (GPS) Real Time Kinematic survey as a verification production tool for MSVR's pit site within the Pahrump Community Pit. This survey reported production of 21,499 cubic yards, for a .24% margin of error between the two surveys. (Jan. 19, 2001, BLM Memorandum re Viability of GPS Real Time Kinematic Surveys as a Production Verification Technique, and Attachments.)

On February 28, 2001, BLM issued a trespass notice to MSVR, served by certified mail. BLM stated that

it is our opinion that [MSVR] committed the following acts:

1. Removal of mineral materials (sand and gravel) from public lands in excess of the contract amount.

^{1/} MSVR agreed to the terms of this document by signing a document entitled "Acceptance of Stipulations for Sand and Gravel Operations in Community Pits."

2. Sale of mineral materials (sand and gravel) from public lands in excess of the contract amount.

(Feb. 28, 2001, Trespass Notice at 1.) BLM informed MSVR that it was in violation of sections 302 and 310 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732, 1740 (2000), Revised Statute 2478, 43 U.S.C. § 1201 (2000), and 43 CFR 9239.0-7. Id. BLM offered MSVR an opportunity to settle the matter and ordered MSVR to provide copies of all sales records and haul records from the property within 10 days, from which it could verify payment owed. Id. at 2.

On March 21, 2001, MSVR submitted a response to BLM, stating that the company questioned the survey. MSVR alleged that the survey did not account for “huge ravines big enough to bury loaders”; that the pit “has been raised due to operations”; and that rock had been added to construct a road to the pit. MSVR asked to see the survey. Its position, however, was that it was not possible to conduct a survey for the prior period. (Mar. 21, 2001, MSVR response at 1-2.) “The only real way to tell what is coming out of the pit is to start now as you contend you now have a valid survey to start from.” Id. at 2. MSVR requested that BLM survey other pits “to make this fair for everyone instead of singling out one operation which seems very prejudicial.” Id. MSVR stated that it would like to settle, but notably neither mentioned nor provided its sale and haul records as requested by BLM. Id.

On April 9, 2001, BLM sent a letter to MSVR providing a copy of the survey. BLM stated that its inspectors found no ravines or anomalies prior to the issuance of a contract to MSVR. BLM also advised MSVR that it was conducting surveys of other pit sites within the Pahrump Community Pit and that MSVR’s assumption otherwise was wrong. Though MSVR had failed to provide them in the 5 weeks already provided, BLM gave MSVR another 10 days in which to provide its sale and haul records. (Apr. 9, 2001, letter from BLM to MSVR.)

On May 1, 2001, BLM issued the decision challenged here. (May 1, 2001, Suspension of Further Sales.) BLM stated that it had not received a response from MSVR, and once again provided 5 more days for MSVR to respond with the sale and haul records. BLM stated that further sales would be suspended until MSVR supplied the required information. BLM advised MSVR that it must remove equipment from the site by May 14, 2001, or any MSVR property remaining on the site would be impounded. (May 1, 2001, decision.) A subsequent inspection report indicated that MSVR left the equipment on the site. (May 17, 2001, Inspection Report.)

On May 16, 2001, MSVR submitted its appeal, presenting three arguments, one of which pertains only to the requested stay, later denied by the Board. MSVR never submitted a statement of reasons (SOR). Failure to submit an SOR subjects an appeal to summary dismissal. 43 CFR 4.412(c). Nonetheless, we will consider the

remaining two arguments in the Notice of Appeal to constitute MSVR's SOR and address them herein.

MSVR states, first, that the survey "was after the fact and they had no previous topo showing all of the huge washouts that were there before we started," that "rock was also used to do 1,775 lineal feet of roadway to and from the pit," and that an "area around the screening area was also raised about 3 feet." (Notice of Appeal at ¶ 1.) Second, MSVR states that "other pits have not been surveyed, so that singles us out." Id. at ¶ 2. MSVR demands in the notice of appeal to see the other surveys and states that "the survey on our pit (even though it is not accurate) will be a lot closer to the numbers it should be, than any other pit there." Id.

BLM responded to these allegations in an answer dated May 24, 2001. With respect to the first argument, BLM stated that prior to the MSVR contracts and again on May 17, 2001, its inspectors found no geologic evidence of "huge washouts." BLM stated that an inspection of the road which MSVR alleged to have been raised by three feet revealed that little material had been used and, in any event, would account for only "roughly 3% of the total trespass amount," that is, presumably, 3 percent of the volume removed in excess of the contract purchases. (Answer at 2.) In response to MSVR's second argument, BLM repeated that it was "in the process of surveying other operations within all of the Las Vegas Field Office's community pits." Id.

BLM regulations make it a trespass to remove mineral materials from public lands without authority by law or contract:

The extraction, severance, injury, or removal of * * * mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States * * *.

43 CFR 9239.0-7. Further, the regulations ensure that BLM may refuse to authorize further sales to a trespasser if satisfactory resolution of the matter is not reached after a demand has been made on the trespasser by certified mail. 43 CFR 9239.0-9(b).

In challenging a trespass decision issued under this regulation and based upon excess extraction of mineral materials, the Board has held that an appellant has the burden of showing error in the trespass decision. M. L. Petersen, 151 IBLA 379, 392 (2000). Similarly, where a damage calculation for removed material is based on a BLM survey, an appellant bears the burden to show by a preponderance of the evidence that BLM's survey was in error or that its value calculations were flawed. Alpine Timber Corp., 141 IBLA 141, 143 (1997), citing Fred Wolske, 137 IBLA 211,

217-19 (1996). “Conclusory allegations of error or differences of opinion, standing alone, do not suffice.” Richard C. Nielson, 129 IBLA 316, 325 (1994).

MSVR fails to meet this burden. MSVR’s allegations of error in the survey are not probative. At best, MSVR argues that the calculations in the survey may be in error because the surveyors allegedly failed to take into account ravines and crevasses and because it used some material to construct a road on the site. MSVR simply does not support these allegations or respond to BLM’s assertions regarding the experience of its inspectors. MSVR has consistently refused to submit information showing the actual amounts it sold or hauled away from the project site. The fundamental issue in this trespass is that BLM found that MSVR took thousands of cubic yards of material from the site for which it did not pay and in excess of its contractual authorization. See Feb. 28, 2001, Trespass Notice. MSVR does not deny this. BLM provided three opportunities, and this appeal a fourth one, for MSVR to substantiate a challenge to BLM’s trespass notice by providing records of what MSVR took and sold from the pit. MSVR’s failure even to acknowledge the request for such data defeats any beneficial construction we could give to its conclusory allegations.

MSVR also misunderstands its obligations under contracts with the United States in arguing that an alleged failure on the part of BLM to survey other pits would justify its appeal. MSVR had contracts with BLM to remove and pay for sand and gravel from public lands. It is not relevant to MSVR’s compliance with its contracts whether BLM investigated others’ contracts, whether other contractors got away with violations of their contracts, or whether MSVR’s total violation was less “than any other pit there.” If MSVR believes that other violators exist in the Pahrump Community Pit, it is free to provide such information to BLM. It nonetheless must comply with the terms of its own contracts.

For the foregoing reasons, we find no basis for reversing or revisiting BLM’s decision. In view of the uncontradicted evidence that MSVR removed materials in excess of its authorization to do so and refused to pay or settle payment demands for the excess material, BLM properly suspended further sales to MSVR and required it to remove its equipment from the site. See 43 CFR 9239.0-9(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge